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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1143

BOOKBINDERS LOCAL NO. 60, INTERNATIONAL BROTHERHOOD OF BOOKBINDERS, A.F. OF L.-C.I.O.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND INTER-COLLEGIATE PRESS, GRAPHIC ARTS DIVISION, SARGENT WELCH SCIENTIFIC COMPANY AND SARGENT WELCH SCIENTIFIC COMPANY,
Respondents.

BRIEF OF RESPONDENTS INTER-COLLEGIATE PRESS, ET AL., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals appears at pp. A-1 - A-16, inclusive, of the Petition for Writ of Certiorari (hereinafter "Pet.") and is reported at 486 F.2d 837, 84 LRRM 2562.

QUESTIONS PRESENTED

1. Under the circumstances of this case, after bargaining impasse does the use of temporary replacements during a lawful lockout constitute a violation of §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 151, et seq.?

2. Has petitioner shown any grounds for granting a writ of certiorari?

STATUTES AND RULES INVOLVED

In addition to those statutory provisions quoted by petitioner, also involved is Rule 19 of this Court's Rules. It states in part:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "* * *
>
> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

STATEMENT OF THE CASE

Respondents are somewhat dissatisfied with petitioner's statement of the case. Instead, we quote the facts and case from the opinion of the Eighth Circuit Court of Appeals:

A. The Facts

(A-5) "* * * The Company prints scholastic year books and graduation announcements at its plant in Mission, Kansas. The Union represents all the full-time and permanent seasonal employees in the cover and bindery departments, and those in the announcement department, who perform paper cutting, finishing, and packaging work. In February, 1967, the Union was recognized as the bargaining representative of the above employees. After seven months of negotiations in 1967 during which a two week strike occurred, agreement was reached between the Union and the Company on a collective bargaining contract that expired August 31, 1970.

"Negotiations on a new contract began July 7, 1970. Fourteen bargaining sessions were held after this date until the Company lockout October 16th. It is uncontroverted that the Company and the Union were at impasse in their negotiations by October 15th, for on that date a federal mediator stated that further bargaining would be 'an exercise in futility.' The Company locked out all employees represented by the Union on October 16th, after being informed that morning that the Company's last contract proposal was unacceptable and the Union had no proposals to make. The last proposal offered provisions somewhat better than those in the expired contract.

"The Union had been made aware as early as September 16th that the Company was considering a lockout, but no progress was made on any of the unresolved issues from that date until the date of the lockout. The parties and the Board are in agreement that the lockout was entirely legal at its inception. No claim has been made that there was any bad faith on the part of the employer at the time the lockout began. The lockout failed to bring about any fruitful negotiations or agreements and effected no change in the Union's bargaining position. A substantial backlog of work had accumulated in the areas manned by locked out employees, and a failure to resolve the impasse before the Company's busy season would have prevented the Company from meeting its delivery schedules. Competitors were contacting Inter-Collegiate's customers and informing them that there would be late deliveries because of the labor dispute, and these customers were threatening to take their business elsewhere unless the Company could guarantee timely delivery. During the time when the Company's busy season was approaching, the Company's salesmen were warning of a substantial loss of customers and good will unless the labor dispute was resolved.

"Inter-Collegiate is engaged in a highly seasonal business. It prepares yearbooks and announcements that must be delivered around the time of school graduations in May and June. The Company guarantees delivery of yearbooks 10 weeks after the complete school's copy is received and delivery of announcements six weeks prior to graduation exercises. Because of this delivery schedule, the Company has a peak period between February and June of each year,

when it operates at over 100% of its plant's capacity (by use of overtime) and adds approximately 300 seasonal employees to its permanent work force of 200. Approximately 66% of their yearbook volume and 98% of their announcement volume is shipped during this busy season. Any disruption has serious consequences for the Company's ability to meet its guaranteed delivery schedules. During the previous busy season the Company had been struck by a different union, and this strike disrupted deliveries and caused the cancellation of some contracts. Many customers who did not cancel their contracts after the late deliveries in 1970 had made it quite clear that they would do so if the situation recurred.

"The Company believed, we feel with justification, that the Union's strategy was to continue negotiations, while working without a contract, into the busy season when a strike or threat of a strike would have left the Company with little choice but to meet the Union's demands. This had been the scenario for the other union's strike during the last busy season.

"The Company was justifiably concerned over the state of its business affairs in November, 1970, for it was necessary to begin production to reduce the backlog of work in preparation for its busy season and produce salesman's samples to aid in the solicitation of new business. If it ended the lockout, there was the very real possibility of a strike during the busy season when it would be too late to hire replacements; it being the Company's belief that at least two months would be required to train new employees for full production and that it could sustain substantial and permanent damage to its business if the Company failed to meet its delivery dates. The permanent loss of a number

of its customers and consequent loss of good will appeared a likely possibility, since its business depended significantly on repetitive patronage.

"The Company, therefore, on November 9th, offered to end the lockout if the Union would agree to a no-strike commitment for the coming busy season. The Union made a counter-proposal whereby it would agree to the no-strike commitment if the Company agreed to sign a contract acceptable to the Union by July 1, 1971. No agreement was reached by the parties. Thereafter, on November 23rd, the Company informed the Union that it would begin hiring temporary replacements unless a contract was signed or a no-strike commitment given by November 30. The Union and the employees were informed that the replacements were to be used only for the duration of the labor dispute, and in any event, their employment would not continue past June 21, 1971. The Company did hire replacements beginning November 30, resumed full production December 1, and continued the lockout until June 1, 1971, at which time the Company offered to reinstate all the locked out employees.

"The evidence clearly indicates that the employer's use of the temporary replacements was motivated only by legitimate and substantial business reasons. We have carefully scrutinized the record and can find no indication that the employer's actions were motivated by any animus or hostility towards the Union or were undertaken to discourage its employees from the exercise of their collective bargaining rights.

"* * *

(A-12) "There has been no showing that the Union's position as bargaining agent was jeopardized

or that it has suffered any diminution in its capacity to effectively represent the employees in the bargaining unit. Although 15 employees did not return to work after the lockout ended, this was apparently because they had found other jobs. There is no indication that any of the union employees who did return has disavowed his union membership."

B. The Decisions Below

(A-2) "The Company was charged with violations of §§ 8(a)(1) and (3) for continuing to operate with temporary employees after instituting an otherwise lawful lockout. After a hearing, the administrative law judge concluded that he was bound by the Board's decision in *Inland Trucking Co.*, 179 N.L.R.B. 350, 72 LRRM 1486 (1969), and found that the Company had violated the above sections by its use of temporary replacements. A majority of the Board disagreed and ordered the complaint dismissed. *Inter-Collegiate Press*, 199 N.L.R.B. No. 35 (1972).

(A-2, fn. 2) "Petitions for review of the order of the NLRB were filed by Inter-Collegiate Press, Graphic Arts Division-Sargent Welch Scientific Company and Sargent Welch (hereinafter referred to in the singular as Company) and the Bookbinders Local No. 60, International Brotherhood of Bookbinders, AFL-CIO. The Union's petition was originally filed in the 7th Circuit and transferred by that Court to the 8th Circuit. The petitions were consolidated by us for hearing. Jurisdiction is established under § 10(f) of the NLRA, as amended, 29 U.S.C. § 160(f). Briefs *amicus curiae* were filed by the Chamber of Commerce of the United States urging affirmance and the International Union urging reversal."

On October 25, 1973, the Eighth Circuit Court of Appeals unanimously affirmed the Board's decision. It said that *Inland* was expressly conditioned on the "circumstances at bar" and was not controlling on this set of facts. It further rejected both of the two opposing *per se* approaches urged by the *amici curiae*. Instead, it followed this Court's opinions in *N.L.R.B.* v. *Brown*, 380 U.S. 278, and *American Shipbuilding Company* v. *N.L.R.B.*, 380 U.S. 300, by scrutinizing in detail the factual context and weighing certain factors. After such careful review and balancing, the Eighth Circuit stated (A-13) that under the circumstances of this case the conduct in question was not "inherently destructive" of employees' rights under the Act. The Court then concluded (A-13):

> "Here the employer has established a legitimate and substantial justification for his conduct and there is no evidence of any unlawful motivation. We therefore agree with the Board that no Section 8(a)(3) violation has been proved."

The Eighth Circuit also agreed with the Board that no § 8(a)(1) violation had been shown in that (A-16)

> "* * * no antiunion animus or hostile motivation has been shown and the employer has established a legitimate and substantial business justification * * *."

ARGUMENT—REASONS FOR DENYING THE WRIT

Petitioner's application for a writ should be denied because the decision below is inescapably dictated by the particular facts of this case. This Court would merely be reviewing the individual facts of this matter and would not be accomplishing those ends contemplated by this Court's Rule 19(b), *viz.*, settling conflicts between the circuits or deciding important questions of federal law. Here there were virtually undisputed facts. We do not understand it to be this Court's function to merely review a circuit court's factual conclusions.

Further, by weighing and balancing the interests of the parties, the Eighth Circuit lucidly applied to such facts the principles enunciated by this Court in *Brown* and *American Shipbuilding*. There is simply nothing for this Court to review or decide. A review by this Court of such application to these facts would not settle any conflict between circuits nor would it decide any important question of federal law.

The claimed conflict with the Seventh Circuit's decision in *Inland* was specifically dealt with by the Eighth Circuit. It pointed out that the *Inland* opinion was expressly based on the "circumstances at bar" (A-3) and that whatever may have been the facts which motivated the *Inland* decision, they were simply inapplicable to the particular fact situation involved here. In view of such vastly different factual contexts (see below), there simply is no conflict between *Inland* and this matter.

To the extent that it may be felt that the Seventh Circuit's decision in *Inland* is perhaps in conflict with the Sixth (in *Ottawa Silica*, see below) and Eighth Circuits, there is ample indication that the Seventh Circuit

has itself backed away from any *per se* implications *Inland* may have. See *N.L.R.B.* v. *Wire Products Mfg. Corp.*, C.A. 7, 484 F.2d 760, at p. 762, fn. 3.

In *Inland*, the employers had locked out and immediately hired temporary replacements. No economic justification was proved. Indeed, the Board found there was insufficient evidence of legitimate and substantial business justification. The Seventh Circuit expressly stated, 440 F.2d, at p. 565, that the employer had failed to come forward with evidence of legitimate and substantial business justification. This is to be contrasted with this case where the Administrative Law Judge, a majority of the Board and the Eighth Circuit all agreed the company had not acted discriminatorily. A majority of the Board and the Eighth Circuit further found there had been no anti-union animus or intent, all supported by an extensive record replete with substantial evidence as to the economic background and circumstances fully explaining the company's use of temporary replacements.

Further, the Seventh Circuit specified it was condemning "a lockout in the circumstances at bar, accompanied by continued operation with replacement labor . . .," 440 F.2d, at p. 565. In this case, there is neither factual nor legal justification for combining the lockout with the use of temporary replacements. Factually, the lockout started October 16th and the use of temporary replacements did not start until November 30th, or 45 days later. The situation between October 16th and November 30th had changed drastically in many respects. Unlike *Inland*, there is simply no factual basis for lumping lockout and use of temporary replacements together. The lockout here was not "accompanied" by use of temporary replacements. The lockout here was never challenged while in *Inland* the union had challenged the lockout's legality.

To understand adequately just why *Inland's* factual situation has absolutely no relation to this case, it is necessary to review the Board decision, 179 NLRB No. 56, and the Trial Examiner's Decision attached thereto. See also 72 LRRM 1486. The facts stated therein show the following material differences from this case (the references are to the Trial Examiner's Decision):

(1) In *Inland*, the union had pledged *in writing* not to strike (p. 4); here, the company repeatedly sought a no-strike commitment but the union persistently refused to give one.

(2) In *Inland*, the employers did not contend they feared a strike (p. 4, fn. 4); here, the Eighth Circuit agreed the company had no choice but to conclude a strike would occur during its busy season.

(3) In *Inland*, the employers did not expressly state to the union the replacements were temporary (p. 9, fn. 10); here, the company informed the union in advance that the use of temporary replacements would cease on a date certain and the company kept its word.

(4) In *Inland*, the union could not have returned the employees to work without accepting the employers' proposed contract (p. 5) and, indeed, the union specifically said it was willing to return on the basis of one employer's last offer (p. 7); here, the union could have returned the employees to work without signing a contract. Thus, the union here always had it within its power to end the use of temporary replacements without capitulation.

(5) In *Inland*, there was no proof of competitive threats or activities (p. 20); here, there was extensive evidence as to the company's competitors taking full advantage of the labor difficulties.

(6) In *Inland*, there was no threat by customers and salesmen to take their business elsewhere (p. 20); here, such customer and salesmen threats were a daily fact of life.

(7) In *Inland*, the Trial Examiner did not agree with proof of the seasonal nature of the business (pp. 8, et seq.); here, proof of the seasonal nature is unchallenged.

Thus, *Inland* is not in conflict with the decision here, the facts being markedly different.

The Sixth Circuit's decision in *Ottawa Silica Co.* v. *N.L.R.B.*, C.A. 6, 482 F.2d 945, is in full accord with the ruling here (a petition for a writ of certiorari has also been filed in this Court, see *Ottawa Silica* v. *N.L.R.B.*, Cause No. 73-807). There simply is no great or novel issue of federal law to be decided by this Court. The decision below turned on the particular facts of this case. To such facts were applied the principles of *Brown* and *American Shipbuilding*. There is neither a conflict between the circuits nor is there an important question of federal law to be decided.

Petitioner cites this Court's footnote in *American Shipbuilding* v. *N.L.R.B.*, 300 U.S., at p. 308, to the effect that in *American Shipbuilding* this Court intimated no view as to a situation where the employer replaced its employees with permanent replacements or even temporary help. While it is certainly true that this Court in *American Shipbuilding* did not specifically state that use of temporary replacements during a lawful lockout was permissible, it exhaustively set forth the guidelines under which such a situation would be viewed as lawful, including the economic facts under which such use would be justified. Indeed, its decision in *Brown* affirmed such use. The Eighth Circuit's opinion here amply demonstrates

this Court's guidelines of *Brown* and *American Shipbuilding* have been scrupulously followed. The necessary balancing of interests and assessment of factual context has been painstakingly done. A review by this Court would involve it in another exhaustive review of the same special fact situation existing here. It would evoke from this Court no important principles of law or statements of new guidelines. Rather, it would merely involve review of a fact situation indigenous to this case and to this case alone. We do not understand it to be this Court's function to involve itself in so specialized a question.

In petitioner's argument (Pet., at p. 5) a number of N.L.R.B. decisions are cited, along with some contentions regarding a 2-1-2 split in the N.L.R.B. in *Ottawa Silica* and in this case. It is then stated, "Thus, an irreconcilable division of the circuits exists * * *", at p. 5. We do not understand a split within the N.L.R.B. to constitute "an irreconcilable division of the circuits". The circuits themselves are consistent. The Sixth Circuit, in *Ottawa Silica*, and the Eighth Circuit in this case have reached uniform results. Any aberration that may be thought to exist by reason of the Seventh Circuit's decision in *Inland* is, as is shown above, dictated solely by the particular fact circumstances of *Inland*, which facts are simply not present here.

This Court's Rule 19(b) makes no reference to a split within an administrative agency as a grounds for certiorari. If indeed there is a split in the N.L.R.B., this can and should be resolved by the circuit courts.

This Court has stated its use of writs of certiorari is designed to serve two purposes: To secure uniformity and to decide questions of great importance. *Magnum Import Co. v. Coty*, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922; *In re Woods*, 143 U.S. 202, 12 S.Ct. 417, 36 L.Ed. 125. In

Rice v. *Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614, this Court stated, at p. 73:

> ". . . we have considered anew whether this case is one in which 'there are special and important reasons' for granting the writ of certiorari, as required by Supreme Court Rule 19.
>
> "This rule, formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely the character of reasons which may be deemed 'special and important', the Rule refers to cases.
>
> * * *
>
> "A federal question raised by petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. (Magnum Import Co. v. Coty, 262 U.S. 159, 163, 67 L.Ed. 922, 924, 43 S.Ct. 531; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, September 7, 1949, 69 Sup. Ct. v. vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proceedings American Law Institute 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

We respectfully submit Petitioner has not demonstrated in its Petition For a Writ of Certiorari any "special and im-

portant reasons" why this Court should undertake a review of the Eighth Circuit's decision.

This case was decided on its own particular facts. The Eighth Circuit's opinion amply demonstrates this. Granting certiorari would not accomplish any of the purposes for which this Court has traditionally taken cases. It would only involve this Court in a review of undisputed facts, upon which a decision of law would achieve none of those objectives set forth in Rule 19.

CONCLUSION

For the reasons and authorities cited above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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